IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date:10.10.2006

CORAM:

THE HON'BLE MR. JUSTICE P.JYOTHIMANI

W.P.No.22221 of 2006

& M.P.No.1 of 2006

The Management of Futura Polyesters Ltd.,
(Formerly known as)
Indian Organic Chemicals Ltd.,
Manali, Chennai 600 068.

... Petitioner

Vs.

1. The Presiding Officer,
I Additional Labour Court,
Chennai 104.

2. A.Manokaran

... Respondents

PRAYER: Petition filed under Article 226 of the Constitution of India for the issuance of a writ of Certiorari, calling for the records relating to order dated 23.06.2006 passed in I.A.No.73 of 2006 in I.D.No.465 of 2004 on the file of First Additional Labour, Chennai.

Petitioner : Mr. R.Thiagarajan, Senior Counsel
for M/s.J.James
N.S.Kishorekumar

Respondent R2 : A.Manokaran (Party in person)

O R D E R

This writ petition is filed challenging the order of the first respondent Labour Court, Chennai, dated 23.06.2006 passed in I.D.No.73 of 2006 in I.A.No.465 of 2004.

2. The case of the petitioner is that the second respondent was working as Plant Operator in the petitioner's manufacturing plant. He was unauthorized absent from 09.02.2004 on the ground of Psychosomanic illness. When he appeared again on 21.02.2004, he was directed to go to Medical Board to check his medical fitness

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for which he declined. Thereafter, he was discharged from service by an order dated 08.09.2004 with retrospective effect. Even before his discharge, the second respondent has raised Industrial Dispute as though he was discharge on 21.02.2004 before the Conciliation Officer. The petitioner/Management has filed a counter statement stating that the second respondent was still in service and was not removed.

3. The Conciliation Officer has sent a failure report on 24.08.2004, which was received by the second respondent and the petitioner on 02.09.2004. It was only thereafter, on 08.09.2004, the second respondent was discharged from service with effect from 09.02.2004. It is on the complaint of the second respondent before the Labour Court that he was removed from service, the Labour Court has taken the same as regular I.D.No.465 of 2004 under Section 2A (2) of the Industrial Disputes Act. Thereafter, the second respondent filed an application in I.A.No.73 of 2006, in the said I.D. stating that he only filed an application before the Labour Court under Section 33(A) of the Industrial Disputes Act, for his non-employment, but the Labour Court without his consent has filed it as I.D.No.465 of 2004 under Section 2A(2) of the Industrial Disputes Act, and therefore, he has filed an application for converting the I.D.No.465 of 2004 as complaint under Section 33(A) of the Industrial Disputes Act. The said I.A. itself was filed in the form of a memo without furnishing any details.

4. The petitioner Management objected. In spite of that the Labour Court has allowed the application holding that in the absence of the Management establishing that order of discharge dated 08.09.2004 was effected after the failure report of Conciliation Officer reached the Government as contemplated under Section 20(2)(b) of the Industrial Disputes Act. It is this order of the Labour Court that is challenged in this writ petition.

5. According to the petitioner, Section 20(2)(b) of the Industrial Disputes Act, has no application for the reason that it was long after the failure report dated 24.08.2004 sent by the Conciliation Officer, the service of the second respondent was terminated by the petitioner by an order dated 08.09.2004, even though it was with effect from 09.02.2004. It is also admitted that under Section 20(2)(b) of the Industrial Disputes Act, a conciliation proceeding is deemed to be concluded when no settlement is arrived at, when the report of the Conciliation Officer is received by the appropriate Government or when the report is published under Section 17 of the Act or when a reference is made by the Labour Court under Section 10 during the pendancy of conciliation proceedings. The conciliation report dated 24.08.2004 was received by the second respondent as well as the petitioner admittedly on 02.09.2004 and the Government also should have

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received on 02.09.2004. Therefore, the conciliation proceedings should be deemed to have ceased at least on 02.09.2004 and even otherwise, it is for the second respondent to establish that it was not received by the Government on that day or at least before 08.09.2005. In the absence of such evidence the Labour Court has clearly erred in holding that the petitioner has not established that the Government has received the report and therefore, the complaint or claim statement filed by the second respondent will be deemed to be a complaint under Section 33(A) of the Industrial Disputes Act, as though the proceedings is pending before the Conciliation Officer. Since the petitioner has himself approached under Section 2(A)(2) of the Industrial Disputes Act, it should be deemed that the pendancy in the Labour Officer is deemed to have ceased and therefore, it cannot be taken as a compliant under Section 33(A) of the Industrial Disputes Act. Even assuming that the termination is passed during the pendancy of conciliation proceedings the remedy of the second respondent was to lodge a complaint before the Conciliation Officer under Section 33(2)(b) of the Industrial Disputes Act, or to file a petition before the Conciliation Officer and not before the Labour Court. Therefore, even assuming that a petition is filed under Section 33(A) of the Industrial Disputes Act, against the order of discharge dated 08.09.2004, the same would lie only before the Conciliation Officer and not before the Labour Court and the Labour Court should have returned the paper for proper presentation to the proper authority concerned. The entertainment of the petition under Section 33(A) of the Industrial Disputes Act presupposes as if, the employer failed to obtain approval of the concerned authority as contemplated under Section 33(2)(b) of the Industrial Disputes Act, on account of pendancy of the proceedings before the Conciliation Officer.

6. According to the petitioner, since the proceedings before the Conciliation Officer has already come to an end, since the Conciliation Officer has sent a failure report on 24.08.2004 which was received by the second respondent as well as the petitioner on 02.09.2004 and it was only on 08.09.2004 the second respondent was discharged from service, it cannot be presumed that the conciliation was pending before the Conciliation Officer which requires a prior approval as per Section 33(2)(b) of the Industrial Disputes Act.

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7. The second respondent, who has appeared party in person has filed a counter affidavit.

8. According to the second respondent, he has joined in services on 07.09.1989 as an Electrician and he was in 15 years of continuous service with unblemished record. The petitioner was denied employment from 21.02.2004 without any reason and without

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conducting any enquiry. The second respondent has raised a dispute before the Conciliation Officer on 30.04.2004. Since there was no settlement, there was a failure report on 24.08.2004 and the failure report was received by the second respondent on 02.09.2004. The second respondent also admits that the petitioner Management has terminated the second respondent from service on 08.09.2004 giving effect from 09.02.2004 retrospectively.

9. According to the second respondent, the conciliation proceeding has commenced on 30.04.2004 ended in failure on 11.08.2004. The conciliation failure report under Section 12(4) of the Industrial Disputes Act, dated 24.08.2004 was received by the second respondent on 02.09.2004. The second respondent would submit that it is not the case of the petitioner that the failure report of the Conciliation Officer was received by the appropriate Government well before 08.09.2004, the date on which, the termination order was passed. When the Government has not received the report as per Section 20(2)(b) of the Industrial Disputes Act, the conciliation proceeding is deemed to continue. Therefore, on the date, when the discharge order was passed by the petitioner on 08.09.2004 the conciliation proceedings was deemed to be pending and therefore, without approval before the Conciliation Officer, the dismissal order should not have been passed and it is in those circumstances, the petition was filed before the Labour Court for the purpose of converting the petition as that of Section 33(A) of the Industrial Disputes Act.

10. It is the case of the second respondent that he intended to file only a petition under Section 33(A) of the Industrial Disputes Act, but the Labour Court has wrongly numbered it as I.D.No.465 of 2004 taking as if, it is a petition under Section 2 (A) of the Industrial Disputes Act.

11. Mr.R.Thiyagarajan, learned Senior Counsel appearing for the petitioner Management would submit that admittedly it was the second respondent who has approached the Labour Court and he was well aware of the fact that it was numbered as I.D.No.465 of 2004 by the same as a petition under Section 2(A) of the Industrial Disputes Act. Therefore, it is now not open to the second resopndent to say as if he intended to file the petition under Section 33(A) of the Industrial Disputes Act.

12. In this regard, the learned Senior Counsel also would refer to Section 33(A) of the Industrial Disputes Act, which states that in cases where an employer contravenes the provision of Section 33 during the pendancy of proceedings before a Conciliation Officer, Board, Arbitrator or Labour Court or Tribunal, any employee aggrieved by such contravention may complain in writing to such Conciliation Officer, Board or Labour Court. If really the

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case of the second respondent is that on the date when he filed an application before the Labour Court under Section 2(A) of the Industrial Disputes Act, thinking that it was only an application under Section 33(A) of the Industrial Disputes Act, while the Labour Court has wrongly taken as an I.D., the proper course would have been for the second respondent only to move the Conciliation Officer and not the Labour Court, because according to the second respondent, the Conciliation was still continuing.

13. On the other hand, it was on 27.09.2004 much after the termination order was passed by the petitioner dated 08.09.2004, the second respondent himself has approached the Labour Court which was numbered as I.D.No.465 of 2004 and therefore, it can never be said that the petitioner only intended to make a complaint on 27.09.2004 under Section 33(A) of the Industrial Disputes Act.

14. The learned Senior Counsel would rely upon Section 20 of the Industrial Disputes Act, to speak about the commencement and conclusion of the proceedings before the Conciliation. He would state that when once there was no settlement arrived at, and a failure report is sent by the Conciliation Officer which is received by the appropriate Government or when the report is published under Section 17 of the Act, a conciliation proceedings shall be deemed to have concluded.

15. In the present case, when it is admitted that the Conciliation Officer has sent his failure report on 24.08.2004 and the second respondent has specifically admitted in the counter affidavit that he has received the failure report on 02.09.2004 and it is also the admitted case of the petitioner/Management that such a report was received by the petitioner/Management also on 02.09.2004, the presumption must be that on the same date at least in any event before 08.09.2004 the failure report ought to have been received by the Government and therefore, it should be taken safely that even before 08.09.2004 the conciliation has concluded and in such circumstances the question of filing an application under Section 33(A) of the Industrial Disputes Act, treating as if the conciliation proceedings have been pending before the Conciliation Officer does not arise and the Labour Court has failed to take this into consideration at all.

16. In view of the same, according to the learned Senior Counsel there was no question of converting the I.D. to that of a compliant under Section 33(A) of the Industrial Disputes Act. The learned Senior Counsel also would rely upon the judgment of the Honble Apex Court reported in 2002(1) LLN 639 to substantiate his contention that what is contemplated under Section 33(A) does not mean that the order of dismissal or discharge becomes inoperative or invalid unless it is set aside as per Section 33(A) of the Act.

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17. On the other hand, the second respondent who has appeared party in person would submit that under Section 20(2) of the Industrial Disputes Act, it contemplates that conciliation is deemed to have concluded only when the failure report sent by the Conciliation Officer which is received by the appropriate Government. The word received means "actual received" by the Government and in the present case it was for the petitioner/Management to prove that the report was actually received by the Government and till that is proved the conciliation is deemed to be pending, even on the date of termination namely on 08.09.2004 and therefore, the petitioner is entitled to approach the Labour Court under Section 33(A) of the Act, by complaining the same. He would also rely upon the judgment of the Hon'ble Supreme Court reported in AIR 1998 SC 2423, wherein the Hon'ble Apex Court has held that unless and until it is proved that the Government has in fact received the failure report, the conciliation is deemed to continue. He would also rely upon the judgment of the Honble Apex Court reported in AIR 1953 SC 88 to show that the word "received" means actual receipt by the appropriate Government and in the present case, since there is absolutely no evidence before the court to show as to the actual date of receipt of the failure report by the Government from the Conciliation Officer, it should be presumed in favour of the employee to the effect that the conciliation is pending. He would also rely upon the report of the Kerala High Court judgement in 1975(2) LLJ 526 to show that for the purpose to invoking powers under Section 33(A) of the Industrial Disputes Act, even if the petition is pending before the Labour Court or Industrial Tribunal the same can be resorted to.

18. According to the second respondent, the manner in which the petitioner was terminated for no reason and without any enquiry and without paying any salary to him shows that it is the case of victimization. He would also state that admittedly the petitioner has passed the order of termination on 08.09.2004 which has been given effect to retrospectively namely from 09.02.2004 and this is illegal.

19. I have heard the learned Senior Counsel for the petitioner as also the second respondent who has appeared party in person and perused the entire records.

20. In this case certain facts are undisputable. On 27.04.2004 at the time when there was no termination order, the second respondent has raised conciliation before the Labour Officer. It is also admitted that the Conciliation Officer has sent his failure report dated 24.08.2004, it is the specific contention of the second respondent in the counter affidavit as also the petitioner/Management in the affidavit that both the

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petitioner as well as the second respondent have received the failure report on 02.09.2004 from the Conciliation Officer. In the absence of any evidence before the Labour Court to show as to when the Government has actually received the failure report, the Labour Court has come to a conclusion on the presumption that it is not even the case of the employer who is the respondent before the Labour Court that the appropriate Government has received the failure report of the Conciliation Officer before 08.09.2004 namely the date on which the second respondent was terminated from service and it was on that basis the Labour Court has presumed that the conciliation before the Conciliation Officer is deemed to be pending and therefore the petitioner is entitled to make a complaint under Section 33(A) of the Industrial Disputes Act. It is also admitted case that the petitioner has terminated the second respondent on 08.09.2004 and the second respondent has filed his complaint before the Labour Court on 27.09.2004 which was taken as a complaint under Section 2(A) of the Industrial Disputes Act, and numbered as I.D.No.465 of 2004, therefore on that date when the I.D. was filed on 27.09.2004 by the second respondent, the second respondent was already terminated from service by the petitioner by order dated 08.09.2004. It was much afterwards in March 2006, the petitioner has filed an application in I.A.No.73 of 2006 under Section 33(A) of the Industrial Disputes Act, for the purpose of converting the Industrial Disputes, into that a complaint. That was allowed by the Labour Court mainly on the ground that the petitioner Management has not proved that the Government has received the failure report from the Conciliation Officer before 08.09.2004 the date on which the second respondent was terminated and therefore, the application under Section 33(A) is maintainable.

21. A perusal of the order of the Labour Court would show that the Labour Court has found that there is a violation of Section 33 (2) of the Industrial Disputes Act, by the petitioner/employer because when the conciliation proceedings has not come to an end as per Section 20(2) of the Industrial Disputes Act. Since there is no evidence to show that the Government has in fact received the failure report, it was the duty of the employer under Section 33(2) of the Industrial Disputes Act, to make an application for approval before the authority before whom the conciliation was pending. Since the Labour Court has come to a conclusion on factual position that the appropriate Government has not received the failure report even though the petitioner as well as the second respondent have admitted that they have received the failure report even on 02.09.2004 by placing reliance upon some of the judgment of the Honble Supreme Court, especially the judgment reported in AIR 1953 SC 88 in the case of the Workers of Industry Colliery Thanbar Vs. Management of Industry Colliery wherein while construing the term received under Section 20(2)(b) of the Industrial Disputes Act, the

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Honble Apex Court has held that it must be taken as per actual date of receipt by the appropriate Government.

22. It is relevant to extract Section 20(2) of the Industrial Disputes Act, which runs as follows:

> "20(2) A conciliation proceeding shall be deemed to have concluded -
>
> (a) where a settlement is arrived at, when a memorandum of the settlement is signed by the parties to the dispute;
>
> (b) where no settlement is arrived at, when the report of the conciliation officer is received by the appropriate Government or when the report of the Board is published under Section 17, as the case may be; or
>
> (c) when a reference is made to a Court, (Labour Court, Tribunal or National Tribunal) under Section 10 during the pendency of conciliation proceedings."

23. It is no doubt true that the said provision specifically used the word "received by the appropriate Government" and therefore the absence of any evidence to show as to when the appropriate Government has actually received the failure report, it cannot be safely presumed that the appropriate Government is deemed to have received the failure report on 02.09.2004 and in my considered view the Labour Court has correctly come to a conclusion that in the absence any proof about the actual date of receipt of failure report by the appropriate Government it should be presumed that the conciliation is still pending. If that is the safe presumption which can be arrived as I have stated earlier, certainly when pending such conciliation proceedings, it is the duty on the part of the employer to follow the procedure under Section 33(2) of the Industrial Disputes Act, which runs as follows:

> "33(2) During the pendency of any such proceedings in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute (or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman) -
>
> (a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or
>
> (b) for any misconduct not connected with the dispute, discharge or punish, whether by dismissal or othewise, that workman:

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Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer."

24. In the present case admittedly, the employer has not followed that procedure. On the other hand, the case of the employer is that when once the petitioner as well as the second respondent have admittedly received the conciliation failure report from the Labour Officer on 02.09.2004 and the report is dated 24.08.2004 there is nothing wrong in presuming the said 02.09.2004 to be the actual date of receipt of failure report by the Government. As I have already held, is not a safe conclusion and cannot be said to be in consonance with Section 20(2) of the Industrial Disputes Act, for the receipt of such report either by employee or employer is inmaterial and it is the actual receipt by the appropriate Government which is a relevant fact as per the Act.

25. On the other hand, when such a conclusion is to be arrived at based on Section 20(2) of the Industrial Disputes Act, the necessary corollary is to construe the beneficial legislation like that of the Industrial Disputes Act, especially under Section 33(2) of the Industrial Disputes Act, which definitely confer certain protection to the workmen against the arbitrary conduct of the employer in terminating him from services has to be construed in favour of the workman. Adding to that in the present case it is not even the case of the petitioner/Management that the second respondent was involved in any mistake conduct. What is complained is that the petitioner is not mentally balanced. It is astonishing to note that except the petitioner/Management arriving at a conclusion about the mental character of the second respondent, there is absolutely nothing on record to show as if there was some illness on the part of the second respondent.

26. Therefore, on the facts and circumstances of the case, I am of the considered view that the Labour Court is perfectly right in coming into the conclusion that the valuable right of a workmen under Section 33(2) of the Industrial Disputes Act, has been violated and therefore, in the interest of justice, the Labour Court has correctly come to a conclusion by converting the application under Section 2(A) of the Industrial Disputes Act, as that of a petition under Section 33(A) of the Industrial Disputes Act. By arriving such conclusion it is only to uphold the right of the employee which has been conferred under Industrial Disputes Act, and in my considered view, such an order is not in any way

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detrimental to the interest of the petitioner/employer except to say that there is some technicality in that. Even after conversion of the same, the right of the petitioner/Management available under the Industrial Disputes Act is not taken away.

In view of the same, the order of the Labour Court is confirmed, the writ petition fails and the same is dismissed. No costs. Consequently, connected W.P.M.P.is closed.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

To

The Presiding Officer,
I Additional Labour Court,
Chennai 104.

Copy to

V.R. Section,
High Court,
Madras.

1 cc to Mr.J.James, Advocate, Sr. 47136
1 cc to Mr.A. Manokaran, Party in person, Sr. 47055

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